COMMONWEALTH OF KENTUCKY
SUPREME COURT
2015-SC-000018-CL

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

JEFFERSON CIRCUIT COURT
INDICTMENT NO. 13CR2070-003
DIVISION 6, JUDGE OLU A. STEVENS

JAMES DOSS — APPELLEE

REPLY BRIEF OF APPELLANT COMMONWEALTH OF KENTUCKY

Submitted by:

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CERTIFICATE OF SERVICE

Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on April 8, 2015: Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, 700 West Jefferson Street, Louisville, KY 40202; Hon. Cicely Jaracz Lambert, Counsel for Appellee, Office of the Louisville Metro Public Defender (by email by agreement to cjlambert@metrodefender.org), Advocacy Plaza, 717-719 W. Jefferson Street, Louisville, KY 40202; the Honorable Henry G. Glyden, Esq., Glyden Law Group, 1228 East 7th Ave, Ste 200, Tampa FL 33605 and the Honorable Stanford Obi, Esq., Stanford Law Office PLLC, 1200 Envoy Circle, Suite 1203, Louisville, KY 40299 (counsel for Amicus Curiae National Bar Association and the NAACP); the Honorable Larry D. Simon, Amicus Committee Chair, Kentucky Association of Criminal Defense Lawyers, 222 South First Street, Suite 307, Louisville, KY 40202, and Hon. Andy Beshear, Attorney General, by email by agreement to heather.johnston@ky.gov. The undersigned does also certify that the record on appeal has not been checked out in preparation of this reply brief.

AM Cohen for Dorislee Gilbert
Dorislee Gilbert

PURPOSE OF BRIEF

The purpose of this reply brief is to supplement the Commonwealth's opening brief by responding to specific claims made by Appellee and *amici curiae*. Specifically, the Commonwealth will respond to: (1) the argument that the trial court's dismissal was based on the composition of the jury panel rather than the composition of the petit jury; (2) the contention that state action has made Appellee's burden of proof impossible to meet, thereby excusing his failure to meet the burden of proof; (3) the alternative contention that Appellee has proven underrepresentation in the specific jury panel at issue and that is sufficient to meet his burden of proof; and (4) the suggestions that changes to the jury process could improve the system.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

CONCLUSION

ARGUMENT

Though Appellee and *amicus curiae* the National Bar Association (NBA) and the NAACP contend that the trial court dismissed the panel because of its composition rather than the composition of the petit jury selected from the panel, the record is rife with evidence that the opposite is true. The court explicitly overruled Appellee's motion finding that there was no fair-cross-section violation while the African American juror remained on the panel. VR 11/18/2014, 01:29:16. The Court expressed being "really troubled" when the lone African American juror was randomly struck and there were no African Americans remaining to sit on the petit jury. VR 11/18/2014, 02:51:47. After the lone African American juror had been struck the trial court found the result was "a jury that is not representative" and noted Mr. Doss was an African American man with no African American on his jury. VR 11/18/14, 02:58:16. The following day, when Appellee moved to dismiss the replacement panel, the trial court explained that the reason it did not initially grant Appellee's motion the day before was because there was one African American on the panel who could have made it onto Appellee's jury. VR 11/19/14, 09:59:36. The trial court denied the motion to dismiss the replacement panel because it included four African Americans but expressed that it would entertain a renewed motion if circumstances changed after questioning and the exercise of strikes. VR 11/19/14, 10:42:19. Furthermore, at times, Appellee specifically argued below that he was entitled to have African Americans on his petit jury. See *e.g.*, VR 11/18/2014, 11:04:58, (defense counsel describing the racial makeup of the panel as causing problem as to Appellee's "right to be judged by a fair cross section of the community"); VR 11/18/2014, 02:53:42 (defense counsel complaining after the random strike of the African

American juror that "not a single member of this jury that is going to be of Mr. Doss's race"); VR 11/18/14, 02:54:17 (defense counsel opining that it is "unfair to Mr. Doss to just have white people on this jury").

Now, even Appellee recognizes that he is not entitled under the law to a petit jury of any particular racial makeup. App. Br. 7, 17 (citing *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). Rather, what he is entitled to is "an impartial jury drawn from sources reflecting a fair cross section of the community." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010). This has been the law as expressed by the United States Supreme Court for at least 40 years and the law as expressed by this Court for more than 25 years (see *Sanders v. Commonwealth*, 801 S.W.2d 665, 672 (Ky. 1990) ("noting that the constitution does not require that a petit jury represent a fair cross section of the community")). The notion is so well-settled and its counter so completely impractical that Appellee has not even attempted any argument justifying the dismissal of a petit jury for its failure to include any African American jurors. The trial court's decision dismissing the petit jury because it did not have a desirable racial makeup was undoubtedly unsupported by sound legal principles and was an abuse of discretion.

However, even if the Court considers that the trial court's dismissal was due to the composition of the panel rather than the petit jury selected, the trial court still abused its discretion by striking the jury panel. Whether analyzed under the lens of the fair cross section requirement as discussed in *Duren v. Missouri*, 439 U.S. 357 (1979), and its progeny, or under equal protection law as discussed in *Castaneda v. Partida*, 430 U.S. 482 (1977), [1] Appellee completely failed to meet his burden of proof—and in fact offered

[1]Appellee points out some overlap in discussions of the fair cross section and equal protection rights at issue. Any confusion of these issues began when Appellee's counsel claimed a fair-cross-section violation

no evidence toward his burden of proof—and the trial court's dismissal of the jury panel was arbitrary. Establishing a violation of these constitutional provisions requires more than a showing of numerical underrepresentation—it requires evidence of a system of jury selection that involves or at least allows intentional discrimination or systematic exclusion.[2] *Alexander v. Louisiana*, 405 U.S. 625, 628-629; *Duren*, 439 U.S. at 364. Setting aside for the moment Appellee's claim that the burden of proving underrepresentation over a period of time is impossible, Appellee has offered no explanation for his failure to offer any evidence regarding the procedures by which potential jurors are identified, summoned, or assigned to various panels. The trial court specifically invited Appellee to give reasons for the court to find that the assignment process was not random (VR 11/18/14, 01:24:49); he did not do so. Rather, he ultimately agreed that they were talking about "a random procedure going on downstairs" but invited the trial court to take action "in spite of the randomness." VR 11/18/14, 02:52:56.

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grounded in due process and equal protection violations and cited a single case that discussed the required burden of proof to show an equal protection violation in grand jury selection (*Castaneda v. Partida*, 430 U.S. 482, 494 (1977). VR 11/18/14, 11:04:30; 11/18/14, 01:24:54 and following.

[2] Appellee misunderstands or misapplies *Castaneda* by describing only a two-pronged burden for showing an equal protection violation. *Castaneda* actually provides for a three-pronged test requiring proof "that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda*, 430 U.S. at 494. First, it requires the defendant to establish that the race or identifiable group to which he belongs is a recognizable, distinct class, singled out for different treatment under the laws. *Id.* He must then prove "the degree of underrepresentation" "by comparing the proportion of the group in the total population to the proportion called to serve as [ ] jurors, over a significant period of time." *Id.* Finally, he must show "a selection procedure that is susceptible of abuse or is not racially neutral" before there can be any presumption of discrimination raised by the statistical showing. *Id.* If he succeeds in proving these three factors, "he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Id.* at 495. Because Appellee presented no evidence about the selection procedure or system of jury selection, he has not shown a violation of equal protection rights. Thus, even if this Court accepts Appellee's illogical argument that the racial makeup of the second petit jury somehow establishes that African Americans make up no more than 10% of most jury panels in that division of the Circuit Court (App. Br. 13), and that this after-the-fact occurrence could somehow meet the burden of proof to support a dismissal that had already occurred, Appellee has still failed to carry his burden of proof to show an equal protection violation because he produced no evidence regarding a system or selection procedure that was susceptible of abuse or not racially neutral.

Even now, Appellee has not offered any evidence of systematic exclusion or intentional discrimination by the state in the jury selection process. He offers suggestions for recordkeeping, possible ways to include more citizens in the jury rolls, and ways to ease the burdens of jury service on citizens, but because a system can be improved does not necessarily mean that it is faulty. It does not mean that the system encourages, allows for, or is even susceptible to discrimination in jury selection, and it is not sufficient to make out a prima facie case to merely point "to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation." *Berghuis v. Smith*, 559 U.S. 314, 332 (2010) (emphasis in original). Moreover, according to Appellee, jury administrators have no information regarding the race of individuals summoned for jury service (App. Br. 11); thus, there is no manner for them to discriminate based upon race. See *e.g.*, *Commonwealth v. Stevens*, 2016-CA-000177-OA, Mar. 16, 2016 Opinion and Order Granting Petition for Writ of Prohibition, P. 13 ("Without knowing the demographics of the potential jurors, one cannot go through the list and systematically exclude any particular group.");[3] *State v. Holland*, 976 A.2d 227, 239 (Me. 2009) ("As the trial court noted, the questionnaires sent to prospective jurors seek no information concerning their race, making it impossible for individuals of any particular race to be systematically excluded from the jury pool.").

Turning to Appellee's claim that the burden upon him to show underrepresentation over a period of time is impossible because the state does not keep records of the race of jurors, it must first be recognized that imposing a heavy burden of

[3] Although the time for appealing this order has not yet run, CR 76.36(7), the order is "effective upon entry and filing with the clerk," CR 76.38(1). This particular order, which is attached in Appendix 1, is marked for publication. As an order of the Court of Appeals, the order is obviously not binding on this Court, and the Commonwealth cites it for its persuasive value only.

proof on a defendant and a presumption that his constitutional rights were not violated does not make his burden of proof impossible. Compare, for example, the heavy burden of proving ineffective assistance of counsel claims and the presumption that "counsel's conduct falls within the acceptable range of reasonable and effective assistance of counsel, as guaranteed by the Constitution." *Humphrey v. Commonwealth*, 962 S.W.2d 870, 873 (Ky. 1998). Second, it cannot be assumed that, if it is impossible for Appellee to prove underrepresentation, the impossibility must be due to the state's alleged failure to keep adequate records or that the failure to keep records somehow proves systematic exclusion or discriminatory intent. Given there was no evidence regarding the procedures for identifying potential jurors, summoning them, and assigning them to panels and Appellee's concession that the process of assignment of the jurors to his panel was random, any impossibility of burden is more likely or at least equally likely due to the fact that there is no intentional discrimination or systematic exclusion occurring in the jury summoning process. See *Stevens*, 2016-CA-000177-OA, Mar. 16, 2016 Opinion and Order Granting Petition for Writ of Prohibition, P. 13 ("[T]he absence of [records of the race of potential jurors] does not support an inference that the Commonwealth is systematically excluding African Americans from the jury pool.").

Appellee's comparison of the federal jury qualification form (requiring prospective jurors to indicate their race and ethnicity) to the state form (which has no such qualification)[4] and his citation to administrative procedures that provide for the

[4] It is entirely consistent with United States Supreme Court precedent for the state not to seek out, identify, or record the race of jurors because doing so could "provide[ ] a clear and easy opportunity for racial discrimination." *Alexander*, 405 U.S. at 630. And while the use of computers for randomization may make racial discrimination more unlikely than when jurors were randomly selected by hand (App. Br. 24), it does not make it discriminatory or exclusionary not to collect such evidence. Nor does it make it less true that it is easier to discriminate on the basis of race if information about race is available than if race information is not available.

destruction of records used in the selection process after "the randomized jury list has been exhausted and all persons selected to serve as jurors have been discharged" (App. Br. 36-37) do not prove that Appellee's burden is impossible or that the state is precluding defendants from offering proof or "immuniz[ing] itself from a successful jury selection challenge"(App. Br. 11, 27). Instead, these claims emphasize the lack of proof Appellee has offered. There is no evidence in the record as to how long it takes for a randomized jury list to be exhausted and all persons selected to serve as jurors to be discharged. AP II § 3 provides that the randomized jury list shall be provided upon request "at least annually," and AP II § 13 provides for access to "records or papers used by the clerk in connection with the selection process" "in connection with the preparation or presentation of a motion under the Rules of Civil Procedure or the Rules of Criminal Procedure." Because records may be maintained and available for at least a year, Appellee's claimed inability to offer any proof or obtain any information from the state is not nearly as dire as he paints it.[5]

Moreover, even if no such official records are available, it does not excuse the complete and utter failure to offer any proof as to any of the elements required to prove the alleged constitutional violations or justify the trial court's dismissal of the jury panel. There is other evidence that—while it might not be as persuasive as official statistics on race of prospective jurors over a period of time—could be offered in support of a claim of underrepresentation. As noted by Appellee and *amici curiae*, there are independent

[5] In Jefferson County, where jury pools serve two weeks at a time, one year's worth of records would provide information from 26 jury pools. Even if the state did not have official records about the race of these potential jurors, their names and other identifying information would be available (see App. Br. App. A), which would provide sufficient information for Appellee to conduct further investigation to identify the race of the jurors, allowing him to then present that evidence in support of his motion.

studies reporting about race and jury selection in other jurisdictions.[6] Appellee has not identified anything preventing the commissioning of similar studies in the Commonwealth. Appellee's own citations reveal that there is at least some evidence available from the Racial Fairness Commission regarding the percentage of African Americans in Jefferson County jury pools. See App. Br. 35, citing http://wfpl.org/listen-racial-imbalance-louisville-juries/ (describing that Kentucky Racial Fairness Commission has reported that 14% of potential jurors in Jefferson County in October were black"); compare Stephan Johnson, "Commission looks at racial fairness in Jefferson County Courts," Nov. 24, 2015, WDRB.com, available at http://www.wdrb.com/story/30599236/commission-looks-at-racial-fairness-in-jefferson-county-courts (noting that percentage of African American population eligible for jury service is 15 or 16 percent; that in 2007 Racial Fairness Commission "concluded there was no evidence of systemic exclusion when it comes to African Americans in the jury pool"). A jury administrator or judge or other member of the legal profession could have provided testimony that would have

[6] There are a number of problems with the studies cited by Appellee and *amici curiae*. First, none of these studies is part of the record below; yet is now offered so as to persuade the Court that race discrimination or systematic exclusion occurs in jury selection and did in this case. Appellee has not suggested that this Court should or could take judicial notice of any of these studies or reports, and this Court should refrain from doing so where doing so is meant to overcome Appellee's failure to present adequate evidence in the trial court. *Mash v. Commonwealth*, 376 S.W.3d 548, 552 (Ky. 2012). Second, none of studies cited analyzes jury selection in Kentucky. See, *e.g.*, App. Br. P. 35. Furthermore, at least one report, the EJI report cited by both *amicus curiae* and Appellee predominately discusses the racially biased use of peremptory strikes and the intentional race-based exclusion of jurors by the prosecution. Neither occurred here or is an issue in this case. The Quarterly Journal of Economics article cited by the NAACP and NBA advises that "[t]he ability of [its] analysis to draw firm conclusions about the fairness of trial outcomes, however, is fundamentally limited by the fact that the strength of the evidence in cases brought against white and black defendants is not observed directly in the data" and that "it is impossible to draw firm conclusions about what relative conviction rates should be for black and white defendants." 127 Q.J.Econ. 1021-1022. Even where the studies recount imbalance in the number of African Americans summoned or available for jury service, they fail to establish that the imbalance is due to state action or procedures. See *e.g.*, *People v. Taylor*, 191 Misc.2d 672, 684-685, 743 N.Y.S.2d 253, 264 (Supr. Ct. NY 2002) ("Underrepresentation resulting from voluntary behavior patterns [e.g., failing to register to vote, not driving, not filing income taxes], unencouraged by state action, does not make out systematic exclusion."). Even if this Court is inclined to consider these studies, which were not cited below and subjected to cross-examination or rebuttal evidence, their value is limited.

shed light on the number of African Americans reporting for jury duty in Jefferson County (such as evidence regarding their own personal recollection of the general representation of African Americans on jury panels or pools over the years), the method of summoning jurors, and the manner of assigning jurors to specific courtrooms. There were apparently other jury selection processes going on with other panels throughout the courthouse at the same time as the jury selection in Appellee's case. VR 11/19/2014, 09:56:19. At a minimum, Appellee could have produced evidence about the racial composition of these other panels even if it was by having someone enter the courtrooms, observe the panels, and then offer testimony about what the person observed regarding the racial makeup of the panels. A statistician or other professional could have testified regarding the number of African Americans in the population and could have provided some insight into the numbers of African Americans who appear on voter rolls in Jefferson County, have drivers' licenses, or file tax returns to help established whether the source lists used to create the jury list reflect a fair cross section of the community and determine what the chances of a panel with the racial composition of the one in Appellee's case would be if the jury summoning system was drawing from a fair cross section of the community. Bottom line: there were ways that Appellee could have offered evidence regarding the racial composition of jury panels or pools other than his own. He chose not to and now he wants this Court to excuse his failure because of alleged "impossibility." If Appellee's burden was impossible, it was not because there was no way to put forth evidence about the racial makeup of Jefferson County jury pools or panels. Where there was no evidence of any sort offered by Appellee, where the record reveals the trial judge who dismissed the jury admitted that the racial makeup of

the jury panel was irregular and not representative of the panels he generally sees (*e.g.*, VR 11/18/14, 01:23:34), and where Appellee agreed that selection of the panel from the larger jury pool was by random process (VR 11/18/14, 02:52:56), Appellee's impossibility claim no more hints at systematic exclusion than it hints at impossibility because there is no systematic exclusion. If the Court accepts Appellee's impossible burden claim as grounds for discharging a jury panel in the absence of any proof (regarding impossibility of burden, population of African Americans in the community, presence of African Americans in Jefferson County jury pools or on panels other than his own, or the method in which the jury selection and summons system works), it will be transforming a heavy, but not impossible burden, into no burden at all.

As an alternative to his impossibility claim, Appellee contends that he can establish an equal protection violation based on evidence of what has occurred in his own case without the necessity of making any showing about what has occurred over time. App. Br. 13-14. He cites *Batson v. Kentucky*,476 U.S. 79 (1986), in support of this claim. In that case, which primarily concerned a defendant's burden of proof in cases where he claims that the prosecution has exercised peremptory challenges in a discriminatory way—an event that did not occur in this case—the Court recognized that a defendant claiming that the state "has discriminated in selecting [his] venire," "may establish a prima facie case 'in other ways than by evidence of long-continued unexplained absence' of members of his race 'from many panels.'" *Id.* at 95 quoting *Cassell v. Texas*, 339 U.S. 282, 290 (1950). Still, he must show more than just that members of his race wee "substantially underrepresented on the venire from which his jury was drawn"; he must also show "that the venire was selected under a practice

providing 'the opportunity for discrimination.'" *Id.* quoting *Whitus v. Georgia*, 385 U.S. 545, 552 (1967). "This *combination of factors* raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array *where the selection mechanism is subject to abuse.*" *Id.* (emphasis added). Appellee offered no evidence about the selection mechanism and no reason to believe it is subject to abuse. He still fails to establish a prima facie case of constitutional violations even on the facts of his own case.

CONCLUSION

Because a defendant does not have the right to a petit jury of any particular racial makeup or exclusively of his own choosing, because randomness is also an important part of ensuring the integrity of the jury system, because a defendant's constitutional rights are to have a fair and impartial jury, to not have persons excluded from possible jury service based upon race and to select his jury from a pool of citizens selected in a non-discriminatory manner, and because there is absolutely no evidence in this case that Appellee's constitutional rights were violated, it was an abuse of discretion to dismiss a jury panel. While it is true that the Sixth Amendment right to a fair and impartial jury belongs to a criminal defendant, "[t]he goal of the Sixth Amendment is 'jury impartiality with respect to both contestants.'" *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) quoting *Holland v. Illinois*, 493 U.S. 474, 483 (1990). The rights of the public and the state are vitiated if a trial court can dismiss a jury panel under the guise that it violates the fair cross section requirement or equal protection clause in the absence of any proof.

Respectfully submitted,

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APPENDIX